TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00127-CV

**Appellants, David Weller and IntegriTech Advisors, LLC //
Cross-Appellant, MonoCoque Diversified Interests, LLC**

v.

Appellee, MonoCoque Diversified Interests, LLC // Cross-Appellees, David Weller and IntegriTech Advisors, LLC

**FROM THE 459TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-004256, THE HONORABLE DUSTIN M. HOWELL, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellants David Weller and IntegriTech Advisors, LLC, filed their notice of appeal complaining of the trial court's denial of their motion to dismiss the counterclaim filed by appellees MonoCoque Diversified Interests, LLC (MDI) in appellants' lawsuit arising out of an employment arrangement gone awry. Appellants sought dismissal of the counterclaims under the Texas Citizens' Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011.[1] Meanwhile, MDI filed its own notice of appeal complaining of the portion of the trial court's order that denied MDI's request for attorney's fees and costs. We will affirm the trial court's order.

[1] The TCPA was amended in 2019, but those amendments do not apply here because the underlying lawsuit was filed before the amendments became effective on September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 11, 12, 2019 Tex. Gen. Laws 684, 687.

PROCEDURAL SUMMARY

Appellants sued MDI, Sean Leo Nadeau, and Mary Alice Keyes[2] for breach of contract, common law fraud, fraudulent inducement, fraud by partial disclosure, and constructive fraud as well as under the Texas Securities Act. MDI answered, asserting counterclaims for tortious interference with a prospective contract, breach of contract, theft of trade secrets, fraud in the inducement, and negligent misrepresentation.

In MDI's "First Amended Answer, Affirmative Defenses, and Second Amended Counterclaim," it alleged that Weller had misrepresented that he had contacts in the aviation industry, that he was knowledgeable about the industry, and that he would use his contacts and knowledge to bring value to MDI; that it had paid Weller a salary in reliance on those representations; and that Weller had not used his contacts or expertise to assist MDI or to materially contribute to MDI's sales. MDI also stated that it had paid IntegriTech to train MDI employees but that IntegriTech had neither provided the training nor refunded the money paid. MDI further asserted that Weller had violated MDI's expectation that he would keep its confidential information and trade secrets confidential, that he had appropriated that information for his and IntegriTech's benefit, and that he took certain information and used it to benefit another company. Finally, MDI alleged:

> Further since his departure from MDI, Weller has been disparaging the principals of MDI and the company itself. Upon information and belief, Weller has been making false reports to the Federal Aviation Agency and making untrue statements about MDI to others in the aviation industry. Upon information and belief, Weller made a false report to the FAA when a company in which he had an interest was not awarded the contract to move an aircraft.

[2] Keyes and Nadeau are MDI's owners and defendants below but are not parties to this appeal.

After its factual recitation, MDI then asserted its counterclaims against appellants, under each counterclaim incorporating its earlier factual allegations "as if restated verbatim" and setting out specific allegations relevant to each counterclaim. MDI alleged that Weller had committed tortious interference with a prospective contract because he was aware that MDI intended to sell a product to a third party and approached the third-party buyer after he left MDI, selling it a different product, "thereby depriving MDI of its profit on the transaction." MDI asserted a claim for breach of contract based on IntegriTech's failure to train MDI employees and a claim for theft of trade secrets, alleging that Weller had at least once since leaving MDI used its trade secrets to "profit personally to MDI's detriment." MDI also asserted a claim for fraud in the inducement, alleging that both Weller and IntegriTech had breached their "duty to refrain from inducing MDI to contract with them by making false representations," which led MDI to hire Weller and share with him its trade secrets and confidential information. Finally, MDI alleged that Weller and IntegriTech had made negligent misrepresentations to MDI "in the course of its business or in a transaction in which they each had a pecuniary interest."

In response to MDI's amended answer and counterclaim, appellants filed their TCPA motion, asserting that by incorporating the allegation about FAA reports, each of MDI's counterclaims "are based on, related to, and/or are in response to Weller's alleged communications with the FAA," which appellants asserted "would be both an exercise of free speech and an exercise of the right to petition." One week later, MDI filed another amended answer and counterclaim, changing the complained-of allegation to allege simply that "since his departure from MDI, it has been reported to MDI that Weller has been disparaging the principals of MDI and the company itself and making untrue statements about MDI to others in the aviation industry." About a month later, before the hearing on appellants' motion, MDI filed a fourth

amended answer and counterclaim, which is its live pleading, altogether deleting an allegation about statements by Weller to others in the industry. MDI added a counterclaim for breach of fiduciary duty against Weller alone and specified that its counterclaim for theft of trade secrets is also against only Weller; that its counterclaims for tortious interference, fraud in the inducement, and negligent misrepresentation are against both Weller and IntegriTech; and that its counterclaim for breach of contract is against only IntegriTech.

Appellants filed a supplement to their TCPA motion, arguing that MDI's amended answer and counterclaim, omitting the allegation about FAA reports, did not moot appellants' TCPA motion. Appellants asserted that under "the governing liberal pleading standard and the broad reach of the TCPA," MDI's counterclaims should still be considered to be based on, related to, or in response to appellants' alleged protected communications with a federal agency. That argument was based on the "various iterations of MDI's counterclaims," as well as evidence gathered through discovery, which, appellants asserted, established that MDI's counterclaims were filed "as a reaction to and subsequent to the alleged communication." Appellants further argued that even if MDI's amended answer and counterclaim "altered the bases for the counterclaims," the motion to dismiss should still be granted because:

> MDI has not nonsuited any of its counterclaims. Its voluntary pleading amendments do not prohibit it from arguing at trial that the alleged protected communications to the FAA entitle it to relief. Nor is MDI prevented from re-inserting the FAA allegations in a subsequent pleading amendment. However, even if MDI's amendments were considered to have effectively non-suited the counterclaims based on the FAA communications, Plaintiffs would still be entitled to relief under the TCPA.

MDI filed a response, asserting that appellants had not met their initial burden of showing that the TCPA applied because the substance of the motion had been mooted by MDI's

removal of the reference to a false FAA report and the FAA complaint was never the basis of any of MDI's counterclaims. MDI also argued that the "now-moot basis of" the motion—the alleged FAA report—was not protected speech because there is no protected right to make false reports to a governmental entity. MDI then provided argument and evidence to attempt to establish a prima facie case for each essential element of each counterclaim. Finally, MDI sought attorney's fees under the TCPA, arguing that appellants' motion was brought in bad faith and solely for delay. *See* Tex. Civ. Prac. & Rem. Code § 27.009(b) ("If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party."). After a hearing on the matter, the trial court signed an order denying both appellants' motion to dismiss and MDI's request for attorney's fees.

STANDARD OF REVIEW

The TCPA is intended to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Id.* § 27.002; *see ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam). We liberally construe the TCPA to fully effectuate its intent of safeguarding and encouraging a person's constitutional rights to free speech, petition, and association while protecting the right to file a meritorious lawsuit. *Coleman*, 512 S.W.3d at 898; *see* Tex. Civ. Prac. & Rem. Code §§ 27.002, .011(b). A motion to dismiss must show that the non-movant's "legal action" is "based on, relating to, or in response to a party's exercise of the right of free speech, right to petition, or right of association." Tex.

Civ. Prac. & Rem. Code § 27.003. If the movant makes that showing by a preponderance of the evidence, the trial court must dismiss the action unless the non-movant establishes by clear and specific evidence a prima facie case for each element of its claim. *Id*. § 27.005(b), (c); *see Coleman*, 512 S.W.3d at 898; *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding).

DISCUSSION

In their appeal, appellants complain that the trial court should have granted their TCPA motion to dismiss, asserting five issues in support of that overall argument. In its cross-appeal, MDI asserts in two issues that the trial court abused its discretion in not ruling on its motion for sanctions under section 27.009(b) and in denying its request for attorney's fees.

1. Denial of TCPA motion to dismiss

We begin with appellants' initial burden of showing that MDI's counterclaims were based on, related to, or in response to appellants' exercise of their protected rights, an issue we consider without regard to the truth of the factual allegations. *See Kinney v. BCG Att'y Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *5 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.); *In re Lipsky*, 411 S.W.3d 530, 543 (Tex. App.—Fort Worth 2013, orig. proceeding). Appellants argue that because MDI included the allegation about false FAA reports in the fact section of its first several answers and counterclaims and then incorporated that allegation by reference in its counterclaims, the counterclaims must be considered to be based on, related to, or in response to protected conduct—Weller's alleged communications with a federal agency. We apply a de novo standard in our review. *See Sloat v. Rathbun*, 513 S.W.3d 500, 503 (Tex. App.—Austin 2015, pet. dism'd); *Serafine v. Blunt*, 466 S.W.3d 352, 357 (Tex. App.—Austin 2015, no pet.). We will consider the issue as if the FAA allegation was still live.

As we noted in *Sloat*, in determining the factual basis for a claim, we look to the pleadings, affidavits, and other evidence, viewing them in the light most favorable to the non-movant. 513 S.W.3d at 504. Viewing the evidence in that light, we must determine the extent to which the factual bases, "as a matter of law, are protected expression within the TCPA's definitions," "favoring the conclusion that [the] claims are not predicated on protected expression." *Id.* "[W]e do not blindly accept attempts by the [movants] to characterize [the non-movant's] claims as implicating protected expression," and we disregard as irrelevant any factual allegations "that are not a factual predicate for [the] claims." *Id.*

Appellants insist that MDI's allegations about Weller's communications with the FAA "form the basis of [MDI's] counterclaims for tortious interference," pointing to deposition testimony by Mary Alice Keyes and Sean Leo Nadeau. In the excerpts appellants provided, Nadeau testified that he believed Weller or one of Weller's close contacts had contacted the FAA in an attempt to "sabotage" MDI but that he was never able to confirm that fact. Keyes testified that there was "a good indication" that Weller had spoken to the FAA because a company MDI used for transport services was questioned about its license and "the only people that would have questioned them would be somebody with a vested interest in whether they were licensed correctly." Asked whether "one of [her] complaints and one of [her] claims in this—in this case, correct, [is] that MDI believes there was a breach of contract and of confidentiality by Mr. Weller speaking to the FAA," Keyes answered, "Yes." However, whether Keyes personally believed Weller had breach his contract or his duty of confidentiality does not mean that MDI's counterclaims were factually and legally based on or related to such breaches. Instead, MDI's claim against IntegriTech for breach of contract is predicated solely on IntegriTech's failure to provide the employee training MDI allegedly paid for. As for MDI's claim for breach of

fiduciary duty against Weller, first asserted in MDI's fourth amended answer and counterclaim (which omits any reference to FAA reports), that claim alleges that Weller misappropriated information related to MDI's sales efforts, diverting sales for his own benefit and in doing so creating conflict between MDI and a long-term business partner, and failed to negotiate a contract he was tasked with negotiating—it does not refer to any statements by Weller to the FAA or to others in the aviation industry. Thus, Keyes's and Nadeau's deposition excerpts do not support a conclusion that MDI's counterclaims were based on or related to the alleged FAA reports. Instead, MDI's counterclaims are based on specific factual allegations that Weller (a) misrepresented his knowledge and contacts in the aviation industry, (b) misappropriated MDI's information for his own benefit, and (c) used MDI's information to arrange for another company to make a sale MDI was pursuing, while MDI paid IntegriTech for training that never happened and paid Weller's expenses but received no benefit in return.[3] Considering MDI's answers and counterclaims in the light most favorable to MDI, *see Sloat*, 513 S.W.3d at 504, we conclude that appellants did not establish that MDI's counterclaims are based on, related to, or in response to any alleged reports to the FAA.

Even if we agreed with appellants that Keyes's and Nadeau's deposition testimony established a circumstantial case that MDI might have asserted its counterclaims in

[3] *See, e.g.*, *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 428-29 (Tex. App.—Dallas 2019, pet. denied) ("Appellees' claims are not based on, related to, or in response to any communications between Dyer and any other person about the FBI investigation or on Dyer providing appellees' proprietary software and confidential information to the FBI. Rather, appellants were sued because they allegedly committed tortious conduct by misappropriating appellees' proprietary software and confidential information with the intent to sell or use that property."); *Beving v. Beadles*, 563 S.W.3d 399, 408 (Tex. App.—Fort Worth 2018, pet. denied) ("all thirteen causes of action arise out of facts occurring well before Beving's affidavit and deposition testimony, and the false-affidavit allegation in the superseded pleading was not used to support any of the thirteen causes of action").

part because of the alleged false reports, that would show only that MDI's counterclaims might be based on, related to, or in response to both protected and unprotected conduct. *See Beving v. Beadles*, 563 S.W.3d 399, 409 (Tex. App.—Fort Worth 2018, pet. denied). When a legal action is based on, relates to, or is in response to "both expression protected by the Act and other unprotected activity, the legal action is subject to dismissal only to the extent it is based on, relates to, or is in response to the protected conduct, as opposed to being subject to dismissal in its entirety." *Serafine*, 466 S.W.3d at 393 (Pemberton, J., concurring) (cleaned up); *see Beving*, 563 S.W.3d at 409; *Walker v. Hartman*, 516 S.W.3d 71, 81 (Tex. App.—Beaumont 2017, pet. denied). Because MDI's counterclaims might at best be viewed as being based on a mix of protected and unprotected activity and because the pleadings, evidence, and parties' argument provide no way to parse out which particular counterclaim is based on protected rather than unprotected conduct and to what degree, the trial court did not err in denying appellants' motion. *See Beving*, 563 S.W.3d at 409; *see also Serafine*, 466 S.W.3d at 364 (when counterclaim was based partially on plaintiff's filing of lawsuit and lis pendens and partially on threatening conduct, this Court reversed denial of TCPA motion "to the extent" counterclaim was based on protected conduct but affirmed denial "to the extent that the claim is based on [non-protected] conduct outside the context of this lawsuit").

We overrule appellants' second issue on appeal, which we have considered as if the FAA allegation was still live. Due to our resolution of that issue, we need not consider appellants' remaining issues, which concern whether MDI presented prima facie evidence of its counterclaims and challenge whether MDI could avoid the application of the TCPA by amending its answer and counterclaims.

2. MDI's Cross-Appeal

In two issues, MDI complains of the trial court's denial of its request for attorney's fees under section 27.009(b) of the TCPA, which provides, "If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party." Tex. Civ. Prac. & Rem. Code § 27.009(b). The trial court did not make an explicit ruling on whether appellants' motion was frivolous or for delay but denied MDI's request for attorney's fees in its order denying appellants' motion to dismiss.

Initially, appellants argue that we lack jurisdiction over the cross-appeal because the TCPA does not provide for an interlocutory appeal of a ruling on a request for attorney's fees under section 27.009(b). However, the trial court denied MDI's request in the same order in which it denied appellants' motion to dismiss. In *D Magazine Partners, L.P. v. Rosenthal*, the trial court issued a single order granting in part D Magazine's TCPA motion to dismiss, denying it in part, and denying D Magazine's request for attorney's fees. 529 S.W.3d 429, 432 (Tex. 2017). D Magazine appealed both from the partial denial and from the denial of attorney's fees, and the court of appeals held that it lacked jurisdiction over the interlocutory appeal from the denial of attorney's fees. *Id*. at 441. The supreme court disagreed, stating, "The trial court issued a single order that partially denied D Magazine's motion to dismiss, including its request for attorney's fees, and D Magazine was entitled to an interlocutory appeal of that order." *Id*. The court then "[a]ddress[ed] the merits of the argument in the interest of judicial economy," and held that the trial court erred in denying D Magazine's fee request because an award of attorney's fees is mandatory if the trial court orders dismissal of a claim under the TCPA. *Id*. at 442; *see* Tex. Civ. Prac. & Rem. Code § 27.009(a).

This case presents a slightly different posture in that it is not a partially successful TCPA movant seeking review of the denial of attorney's fees under section 27.009(a) but a successful TCPA respondent seeking interlocutory review of the denial of attorney's fees under section 27.009(b). However, that ruling was made in the same order in which the trial court denied appellants' motion to dismiss, and we are allowed to exercise jurisdiction over an appeal from "an interlocutory *order* . . . that denies a motion to dismiss filed under" the TCPA. Tex. Civ. Prac. & Rem. Code § 51.014(a)(12) (emphasis added); see also *id*. § 27.008(b) (providing that all appeals, "whether interlocutory or not, from a trial court *order* on a motion to dismiss a legal action under Section 27.003" should be expedited (emphasis added)). In light of the supreme court's holding in *D Magazine* and the specific language used in those two statutes and in the interest of judicial economy, we will consider MDI's cross-appeal. *See D Magazine*, 529 S.W.3d at 441-42.

We review the issues raised in MDI's cross-appeal for an abuse of discretion. *See Sullivan v. Texas Ethics Comm'n*, 551 S.W.3d 848, 856-57 (Tex. App.—Austin 2018, pet. denied). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without regard to guiding principles. *Id.* at 857; *see Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). The TCPA treats the award of attorney's fees differently for movants versus respondents—an award of reasonable attorney's fees is mandatory for a successful movant whereas an award to a successful respondent is discretionary even if the trial court makes the required findings that the motion was frivolous or solely intended to delay. *Cruz v. Van Sickle*, 452 S.W.3d 503, 525 (Tex. App.—Dallas 2014, pet. denied). "Frivolous" in the context of section 27.009(b) means a claim or motion that has "no basis in law or fact"—one that "lacks a legal basis or legal merit." *Sullivan*, 551 S.W.3d at 856-57 (cleaned up).

In this case, the trial court did not find that appellants' motion was frivolous or solely intended to delay—indeed, it did not make findings as to those questions at all. And even if the record contained such findings, the trial court still had the discretion to decide whether to award MDI any attorney's fees. *See* Tex. Civ. Prac. & Rem. Code § 27.009(b); *Cruz*, 452 S.W.3d at 525. After the trial court signed its order denying appellants' motion and MDI's request for attorney's fees, MDI did not complain to the trial court about its failure to make explicit findings as to whether the motion to dismiss was frivolous or solely intended to delay. Although the trial court conceivably could have found in MDI's favor on frivolousness or delay, it did not make any findings in either direction.

Given the fact that the trial court did not make and MDI did not seek the required findings that could support attorney's fees under section 27.009(b), we decline to hold as a matter of law that appellants' TCPA motion utterly lacked a legal or factual basis or was filed solely with an intent to delay the proceedings. *See* Tex. R. App. P. 33.1(a) (to preserve complaint for appellate review, record must show that complaint was timely made to trial court and that court ruled on complaint either expressly or implicitly); *see also MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 141 (Tex. 2014) ("If MAN wanted judgment based on that clause . . . , we think it should have brought this separate ground to the attention of the trial court with 'sufficient specificity to make the trial court aware' of the argument."). On this record, we decline to hold that the trial court abused its discretion in not awarding MDI its requested attorney's fees and we overrule MDI's issues in its cross-appeal. *See Sullivan*, 551 S.W.3d at 857-58 (overturning attorney's fees award because "we cannot on this record conclude as a matter of law that appellants' motion entirely lacked a basis in law or fact" or that "delay was the only factor").

CONCLUSION

We have held that appellants did not carry their initial burden of showing that the TCPA applied to MDI's counterclaims. We have also overruled MDI's complaints related to the trial court's failure to award it attorney's fees under section 27.009(b). We therefore affirm the trial court's order.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Kelly and Smith

Affirmed

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